The Brexit agreement: an unlikely role model for the WTO?

How the WTO enforcement mechanism could be improved with insights from the UK withdrawal agreement

Cécile Ballorain 2019-12-17T12:00:12

On the one hand, the WTO. This institution that was considered the 'jewel in the crown', has now been deprived of an Appellate body, a problem which is only the tip of the iceberg. On the other hand, Brexit. Triggered by the referendum in 2016, postponed multiple times, a problem which seems to be here to stay, notably considering the overwhelming win of the conservative party on 13th December. Two subjects which at first sight seem completely unrelated. And yet, there is one point where they align: their dispute settlement mechanism. Indeed, the dispute settlement mechanism of the 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy community' (BWA) (which is one the few things the UK and the EU seem to have settled in October 2019) seems to be a direct copy of the WTO dispute settlement mechanism, notably Articles 21 and 22 of the Dispute Settlement Understanding (DSU).

This Article will in particular examine whether with their mechanism the UK and EU have actually managed to solve the inherent flaws of the WTO enforcement mechanism, in particular the sequencing issues of Article 21.5 and 22.2, the lack of retrospective remedies and the lack of review of retaliatory measures.

A succinct overview of the BWA Dispute Settlement mechanism:

The dispute settlement mechanism of the BWA is contained in Articles 167-181 of the BWA. The first step in case of disputes is for the states to enter into consultations in good faith (Articles 167 and 169). If no solution has been found within 3 months, the UK or the EU may request the establishment of an arbitration panel which shall be composed of five members picked from a list established by both states and which shall be established within 15 days of the request (Articles 170 and 171). The arbitration panel then has twelve months to notify its ruling to the UK or the EU unless a party submits a request to the effect that the case is urgent in which case the panel will have 15 days to give its ruling (Article 173). At any time a question can be referred to the CJEU to interpret a provision of Union law during which the proceedings shall be suspended (Article 174). The ruling of the panel is binding (Article 175). The respondent has 30 days to notify the complainant of the time it will require for compliance. In case of disagreement, the complainant can within 40 days of the notification ask the original panel to rule on the matter and determine

the length of the reasonable period of time (RPT). The respondent shall inform the complainant of its progress with complying (Article 176). If at the end of the RPT, the complainant considers that the respondent has failed to comply, it may request the arbitration panel to rule on the matter (Article 177). The arbitration panel may as a result impose a lump sum or penalty payment to be paid to the complainant and in case of no compliance authorize the suspension of obligations which should be proportionate and temporary (Article 178 (1), (2) and (5)). Should the respondent feel that the measures are not proportionate it may request the original panel to rule on the matter (Article 178(3)). Any temporary remedies shall be reviewed within 45 days of the notification by the respondent that it has brought itself in to conformity with the ruling of the panel and the suspension of obligations shall be terminated within 15 days (Article 179).

Between consultations, arbitration panels, the establishment of an RPT and temporary remedies such as compensation or suspension of part of the Agreement, there is clearly a very strong resemblance between the BWA and Articles 21 and 22 of the WTO DSU.

The BWA: A new and improved version of the WTO enforcement mechanism?

The BWA would seem at first sight to be even more comprehensive than the WTO system providing a sort of 'fail safe' should any issue in compliance arise. Not only that, but a study of this agreement shows that it seems to have managed to resolve some of the problems of the WTO enforcement mechanism:

First, it is no secret that there is a sequencing issue between Article 21.5 and 22.2 of the WTO DSU. Indeed, states have had to resort to bilateral agreements to decide which of the Articles would come first as there is absolutely no way to respect the DSU's tight deadline should a state want to go through both procedures. There is no such type of inconsistency in the BWA between compliance and retaliation proceedings as temporary remedies can only be awarded *after* a finding by the panel that the respondent has failed to comply with the panel's ruling. Article 177 of the BWA therefore supersedes Article 178.

Second, contrary to the DSU which only provides for prospective compensation, the BWA provides for retrospective reparations as the panel 'shall take into account the duration of the non-compliance and underlying breach of obligation' (Article 178(1) BWA). Furthermore, compensation is not dependant anymore on the agreement of both parties as provided in Article 22.2 of the DSU but the 'lump sum or penalty payment' will be *imposed* by an arbitration panel if it finds that the respondent has failed to comply with its obligations (Article 178 BWA). This compensation mechanism is in particular subject to a less tight deadline as the respondent has one month to comply. This seems to solve the inherent flaw of the WTO enforcement mechanism considering that as compensation has only been awarded in one single case (*US -Section 110(5) Copyright Act*), it becomes in the end more profitable for the respondent to simply keep the trade-restrictive measure in place

Third, the equivalence of suspension of concessions are less tightly regulated, requiring suspensions within the same sector under the same agreement or a

different sector within the same agreement etc. (Article 178(2) BWA) making it perhaps easier to retaliate, thus encouraging compliance by fear of retaliation. One big difference is especially that Article 179 BWA provides for a *review* of retaliatory measures if the respondent argues that it has complied with the panel award and the panel shall deliver its ruling within 45 days. On the contrary, in the DSU there is absolutely no provision for the withdrawal of retaliatory measures a problem reflected in two recent cases (*EC-Hormones/US-Continued Suspension*). As the WTO is an institution advocating the liberalization of trade, this reliance on trade-restrictive measures might seem a bit ironic.

A reform path for the WTO?

In spite of those flaws, the WTO enforcement mechanism has two obvious strengths: First, it is one of the rare institutional mechanisms that actually provides a mechanism to settle disputes *after* the award is rendered. Second, it provides for an *oversight* of the implementation via the DSB monitoring.

On the other hand, the BWA is of course not a perfect agreement and has yet to be tested in practice. Indeed, it provides for very tight time-limits which will have to be managed especially in case of a question to the CJEU which might extend the proceedings for quite a long time. Furthermore, it does not have a DSB to survey the implementation of measures as the respondent shall only 'inform the complainant in writing of its progress in complying with the Arbitration panel ruling' (Article 176(4) BWA).

Nothing is sure about the future of the WTO. Is the crisis of its Appellate body the beginning of the end for it or a much-needed wake-up call to reform? We will know in a very short time. But this Article goes to show that the BWA could be a possible reform path to tackle some specific issues regarding the WTO enforcement system which could help in regulating the power-based future it is facing.

Furthermore, if even the UK and the EU, involved in one of *the most* contentious issues of our time, could agree to what seems in theory to be a foolproof dispute settlement mechanism, the powers involved in the WTO might want to learn a lesson from it.

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